84-933
No.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER,
WILLIAM V. WILKEN,
and CHARLES W. RAMSEY,
Petitioners

vs.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. WAS THE COURT OF APPEALS' FINDING OF MOOTNESS BASED ON RESPONDENTS' ABANDONMENT OF WRONGFUL BENEFITS INTEGRATION TOO SUMMARY WHEN COURT IGNORED IMPORTANT REMAINING ISSUES OF (a) FIDUCIARY REMOVAL FOR DUAL LOYALTY AND ADVERSARIAL REPRESENTATION PREVIOUSLY CONDEMNED IN *NLRB V. AMAX COAL CO.*, 453 U.S. 322 (1981) AND *SCNEIDER MOVING & STORAGE CO. V. ROBBINS*, ____ U.S. ____, 80 L.ED.2D 366 (1984), AND (b) DAMAGES RESULTING FROM DISCOURAGEMENT AND OTHER EXTRACONTRACTUAL DAMAGES, WHICH DAMAGE ISSUES THIS COURT WILL SOON ADDRESS IN MASSACHUSETTS MUTUAL LIFE INS. CO. V. RUSSELL, NO. 84-9?

2. EVEN THOUGH THREATS ARE ABANDONED AFTER CHALLENGE BY ERISA LAWSUIT, DOES A DISCOURAGED PLAN BENEFICIARY HAVE A CAUSE OF ACTION FOR ERISA PLAN ADMINISTRATORS' PRIOR THREATS TO WRONGFULLY INTEGRATE PLAN BENEFITS WITH STATE WORKER'S COMPENSATION BENEFITS, WHERE UPON ABANDONMENT BENEFICIARY IS THEN BARRED FROM PURSUING STATE CLAIM PREVIOUSLY ASSURED AS FUTILE?

3. WHERE ERISA PLAN ADMINISTRATORS THREATENED IN STATE PROCEEDINGS TO WRONGFULLY INTEGRATE ERISA PLAN BENEFITS WITH STATE WORKERS' COMPENSATION AWARDS, ARE PLAN BENEFICIARIES ENTITLED TO TRIAL TO RECOVER FOR LOSS OF INTEREST ON THE UNCONTESTED CREDIT AMOUNT AND RECOVER OTHER CONSEQUENTIAL DAMAGES SUCH AS LOST WAGES AND ATTORNEYS FEES INCURRED IN SUCH STATE PROCEEDING?

LIST OF PARTIES TO THE PROCEEDINGS

All parties are fully listed in the caption.

Petitioner Hechenberger is a Missouri employee of Western Electric Company, now renamed AT&T Technologies, Inc., and by reason of his employment was a participant in the respondent Western Electric Plan. Petitioners Wilken and Ramsey are Missouri employees of Southwestern Bell Telephone Company and by reason thereof participants in the respondent Southwestern Bell Telephone Company Plan. Both respondent plans are ERISA benefits plans covering employees in many states.

Respondent Richard Rousselot is the Director of the state agency administering the state workers' compensation programs. Mr. Rousselot originally intervened and was then subject to petitioners' cross-claim arising out of the activities of his agency's personnel.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Citations to Opinions Below 1

Jurisdictional Statement 2

Statutes Involved 2

Statement of Case 3

Jurisdiction of Federal Court 4

Reasons for the Allowance of the Writ 5

Question I: Summary Affirmance Insufficient for Presented and Factually Supported Issues of (a) Dual Loyalties and Other Fiduciary Misconduct and (b) Extracontractual Damages. 5

Question II: Does ERISA Protect Discouragees? . 13

Question III: Does ERISA Allow Extracontractual Compensatory Remedies? 17

Conclusion 21

Appendix A A-1

Appendix B A-6

Appendix C A-7

TABLE OF AUTHORITIES

Cases Cited

Adikes v. S.H. Kress & Co., 398 U.S. 144 (1970) 12

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 9,14

Allee v. Medrano, 416 U.S. 802 (1974) 8

Allis-Chalmers Corp. v. Lueck, No. 83-1748, 53 Law Week 3235 17

Clayton v. United Auto Workers, 451 U.S. 679 (1981) .. 16

Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, ____ U.S. ____, 80 L.Ed.2d 428 (1984) 18,19

Evans v. Missouri Utilities Co., 671 S.W.2d 812 (Mo. App. 1984) 8,14

Katsaros v. Cody, 744 F.2d 270 (2nd Cir. 1984) 11

Lewis v. Benedict Coal Corp., 361 U.S. 459 (1910) 17

Monson v. Century Mfg. Co., 739 F.2d 1293 (8th Cir. 1984) 5

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 5,12,16,21

Powers v. Johnson, 306 S.W.2d 616 (Mo.App. 1953)... 11

Russell v. Massachusetts Mutual Life Ins. Co., 722 F.2d 482 (1983), *cert. granted sub nom.* Massachusetts Mutual Life Ins. Co. v. Russell, No. 84-9, 53 Law Week 3235 5,12,17,20,21

Schneider Moving & Storage Co. v. Robbins, ____ U.S. ____, 80 L.Ed.2d 366 (1984) 5,12,16,17,21

Shaw v. Delta Airlines, ____ U.S. ___, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)..... 14

Strohmeyer v. Southwestern Bell Telephone Co., 396 S.W.2d 1 (Mo.App. 1965) 6,7,8,10

Teamsters v. U.S., 431 U.S. 324 (1977) 14,16,17

United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968) 8

United States v. W. T. Grant, Inc., 345 U.S. 629 (1953) 11

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944) 8

Statutes

29 U.S.C. §1001 ..... 16,A-7

29 U.S.C. §1104 ..... 9,10,11,16,A-7

29 U.S.C. §1106 ..... 10,11,16,A-8

29 U.S.C. §1132 2,11,17

29 U.S.C. §1144 ..... A-8

R.S.Mo. §287.260 ..... 18,A-9

R.S.Mo. §287.430 ..... 13,A-9

Rule 54(c), FRCP 19,A-9

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RICHARD A. HECHENBERGER,
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WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the three-judge panel of the Eighth Court of Appeals in this proceeding is reported at 742 F.2d 453. It is printed in Appendix A hereto, infra, pages A-1 through A-5. The order of the Court denying petitioners' Petition for Rehearing and for Rehearing En Banc is printed in Appendix B hereto, infra, page A-6.

The decision of the district court is reported at 573 F.Supp. 71.

JURISDICTIONAL STATEMENT

The judgement of the Court of Appeals for the Eighth Circuit was entered August 28, 1984. A timely petition for rehearing or rehearing en banc was denied on October 12, 1984. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are Sections 2(b), 404(a)(1)(A)(i) and (D), 406(a)(1)(D) and (b)(2), 502(a)(1)(B) and (3) and 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001, 1104, 1106, 1132 and 1144. The principal ERISA section relied upon is Section 502 which reads

> (a) A civil action may be brought—
>
> (1) By a participant or beneficiary—
>
> (B) . . . to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .
>
> (3) By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;"

The balance of the ERISA provisions are printed in Appendix C, infra, pages A-7 through A-9.

STATEMENT OF CASE

Petitioners are workers of respondent employers, who received payment from respondent ERISA benefit plans for their temporary absences from work due to injuries. Respondents Southwestern Bell and Western Electric administer their similarly worded ERISA benfit plans through their unilaterally appointed Employee Benefit Committees ("EBC"), consisting of high ranking executives of respondents.

These same EBC's also take active part on behalf of the respondent employers in the defense of the petitioners' state workers' compensation claims for those same injuries, in which adversarial proceedings plan questions arise. The EBC-directed personnel assert positions on those plan questions to favor only the employer. The questions raised by respondents in such adversarial state proceedings include integration of plan benefits paid for temporary absences, with state "permanent partial disability" ("PPD") entitlements and with state temporary total disability ("TTD") entitlements. Entitlement to PPD awards under state law does not require absence; payment is usually considered to be for anticipated future diminution in lifetime earning capacity as a result of the residual injury. TTD entitlements are for absences while recuperating from the injury. Petitioners suffered residual injuries.

This dispute is over respondents' total conduct with regard to what the Eighth Circuit viewed as integration of ERISA plan benefits with state workers' compensation awards. Appendix A, p. A-2 n.1. Integration with PPD awards was taking place only in Missouri during the pendency of the instant action. As a result of discovery petitioners further contended respondents concealed plan history which revealed the plan did not permit integration with workers' compensation benefits, and certainly not with PPD awards to which petitioners claimed entitlement.

Respondents announced abandonment of their integration practice with state PPD awards a year and a half after the ins-

tant suit was filed, shortly before the scheduled trial date. Respondents did not abandon, however, their dual loyalties in otherwise carrying out the plan and interpreting it, but instead continued to insist that notwithstanding plan history prohibiting integration they could reinterpret the plan whenever they chose solely for the purpose of reducing the employers' costs. Moreover, respondents as plan fiduciaries, through their unilaterally appointed EBC's, did not abandon their state workers compensation practice of representation of employer interests adverse to beneficiaries as to benefit plan matters.

The district court permitted no question as to respondents' sincerity in abandoning and held no hearing. It granted summary judgment, finding the limited abandonment of integrating plan benefits with state PPD awards mooted the instant case on all issues presented since none of the petitioners had in fact suffered a "reduced" state award before abandonment. Respondents' prior threats were held non-actionable.

On appeal the Eighth Circuit Court of Appeals affirmed the district court. The Court of Appeals found no justiciable controversy is created as long as respondents announced abandonment before the threatened integration actually "reduced" the state award to petitioners, without examining into the issues of dual loyalties and the adversarial conduct by plan fiduciaries and the consequences of that conduct (remedies). It made no finding or comment on dual loyalties of those administering the plan, on fiduciary representation of interests adverse to beneficiaries as to plan issues on concealment, on rights of discouragees, on petitioners' evidentially-established extracontractual damages or on petitioners' claim for fiduciary removal.

JURISDICTION OF FEDERAL COURT

The jurisdiction of the federal court was invoked pursuant to 29 U.S.C. §§185(a) and 1132(a). (Section 502 of ERISA and Section 301 of the NLRA.)

REASONS FOR ALLOWANCE OF THE WRIT

I. Question: Summary Affirmance Based On Limited Abandonment Insufficient For Presented And Factually Supported Issues Of (a) Dual Loyalties And (b) Damages.

This case represents a multitude of dual loyalty problems. No hearing on that issue was ever allowed. In dismissing on respondents' respective summary judgment motions, the district court and then the Court of Appeals limited sole consideration to the fact of abandonment of integration threats against state PPD awards not yet fully carried out as to petitioners.

Petitioners submit mootness is a "last-resort" doctrine, not to be used when there are outstanding dual loyalty and adversarial conduct trust questions this Court has several times recognized, as in *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330-334 (1981), and more recently in *Schneider Moving & Storage Co. v. Robbins*, ____ U.S. ____, 80 L.Ed.2d 366 (1984). While the Eighth Circuit would clearly classify respondents in their role of plan administrators as ERISA-defined fiduciaries, *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984), in the instant case the Court of Appeals chose not to deal with dual loyalty and adversarial representation questions. Petitioners submit that the decision of the Court of Appeals reveals it was too summary in dealing with the fiduciary questions for which this Court demanded careful consideration and sensitivity in *Amax Coal, supra,* and *Schneider Moving, supra.*

Under the circumstances, this is a case on which to grant certiorari or remand to the Eighth Circuit for more detailed consideration in light of *Amax Coal, supra,* and *Schneider Moving, supra.* If the Court is not prone to presently grant the writ or remand for further consideration, petitioners submit that this Court hold this petition for decision in light of this Court's recent grant of review in *Massachusetts Mutual Life Ins. Co. v. Russell,* No. 84-9, 53 Law Week 3235, which case raises some of

the same reasons for awarding non-benefit damages arising out of fiduciary misconduct, as is presented by the instant case.

It may be that the Court of Appeals rejected careful consideration of the dual loyalty and other fiduciary misconduct questions petitioners presented because of its finding that the respondents integrated only after they first secured "approval" by the state court in *Strohmeyer v. Southwestern Bell Telephone Co.*, 396 S.W.2d 1 (Mo.App. 1965). Appendix A, p. A-3. But the evidence petitioners presented in opposition to summary judgment reveals that the state court decision was tainted by the same dual loyalty/adversarial representation misconduct presented in opposition to summary judgment in this instant suit.

In the instant case, using the federal discovery rules, petitioners discovered various historical documents previously concealed from workers. This history revealed:

1. The original anti-duplication provisions of the Bell System benefit plans, of which the respondent plans were a part, were not drafted to prohibit duplication of plan benefits with workers compensation benefits.[1] No injured worker ever had to elect whether to take plan benefits or work comp benefits. The "election" provision the state court in *Strohmeyer, supra,* stressed, was never intended to compel the beneficiary to choose between plan benefits and worker's compensation benefits.

2. In 1941, some of respondents' own attorneys pointed out plan ambiguity in making comparisons under the offset provision as previously written,[2] controverting the

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[1] Exhibit 3, pages 2-3. Exhibits and testimony cited in these footnotes were part of the clerk's record ("CR") on appeal to the Eighth Circuit under 8th Cir.R.7(e).

[2] Exhibit 82, pages 18-25.

"specific negation" of both plan benefits and PPD awards that respondents later successfully convinced the state court in *Strohmeyer, supra,* and other cases, to find.

3. In 1942 a Bell System study committee recognized that plan benefits paid for temporary absences were of a different character and did not carry out the same purposes as state PPD benefits,[3] leading to an official AT&T interpretation that no offset for plan benefits against PPD awards was to be taken.[4] The respondents then committed themselves to that system-wide no-offset plan interpretation.[5]

4. In 1946 the Bell System companies, including respondents, "froze" that no-offset interpretation by amending the offset provision to prohibit offsets unless the benefit is of "the same general character." The amendment was proposed for the express reason of changing the provision as it previously read to meet the way that the Bell benefits plans were then being administered—no offset against PPD awards.[6]

Notwithstanding this history, to secure state "approval" of the integration practice, in the mid-1960's the Southwestern Bell respondents misrepresented to the Missouri judiciary that the plan provisions since 1913 had always been the same and that the anti-duplication provisions of the plan had been designed to prevent the injured worker from receiving both plan payments and workers' compensation benefits. Those repondents concealed from the Missouri judicial system the plan history discovered in this instant proceeding. The Missouri courts ac-

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[3] Exhibit 40, pages 5-7.

[4] Exhibit 43.

[5] Exhibits 29 through 32 and 75.

[6] Exhibit 46, page 1.

cepted respondents' presentation that the plan had always "expressly negated" both plan benefits and workers' compensation PPD awards. *Strohmeyer v. Southwestern Bell Telephone Co., supra,* 396 S.W.2d at 7; *Evans v. Missouri Utilities Co.,* 671 S.W.2d 812, 814 (Mo. App. 1984).

Once having obtained *Strohmeyer, supra,* the Southwestern Bell respondents thereafter integrated in Missouri in reliance thereon. Notwithstanding their fiduciary role as plan administrator they continued to conceal the actual plan history from the Missouri courts and from beneficiaries until discovered in the instant proceeding by petitioners' extensive discovery. Some ten years after *Strohmeyer, supra,* and fully cognizant of the plan's true history and system-wide interpretation and practice not to offset,[7] the Western Electric respondents decided to follow the Southwestern Bell respondents' integration practice in Missouri.

Only after petitioners' discovery of the concealed plan history in the instant case and after the district court had scheduled class hearing and trial dates, on June 1, 1983 the Western Electric repondents moved for summary judgment. They announced the threats to integrate plan benefits with PPD awards in Missouri was being abandoned forthwith, but they claimed their fiduciaries' 1981 plan (re)interpretation of the existing plan language gave them the right to integrate against PPD awards in all states under ERISA preemption.[8] At the time of their decision to abandon, the Western Electric respondents did not claim orally or in any document filed in the district court any knowledge that the Missouri legislature was about to change the

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[7] Exhibit 29, pages 5-7.

[8] CR, pages 84, 93-94. Respondents' insistence on the continuing legality of their integration practice provides additional reason to question mootness. *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944); *Allee v. Medrano,* 416 U.S. 802 (1974); *United States v. Concentrated Phosphate Export Ass'n.,* 393 U.S. 199 (1968).

statute to prohibit all integration with workers' compensation awards. The Court of Appeals cited the statutory change as meaningful, albeit acknowledging ERISA pre-emption banned such a flat statutory prohibition by its citation to *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Appendix A, p. A-3.

Shortly after the Western Electric's abandonment announcement the parties learned the Missouri legislature amended state law to prohibit integration for all injuries occurring on or after September 28, 1983. The Governor signed the legislative amendment July 28, 1983. On August 25 the district court found the threat made to petitioner Hechenberger did not create any justiciable case or controversy since Hechenberger's worker's compensation claim had not then been reduced by the state agency, and that the Western Electric respondents' abandonment announcement made his case moot. Summary judgment was granted. Two days following this ruling, on the eve of the rescheduled class certification hearing, the Southwestern Bell respondents followed Western Electric's lead, announcing abandonment of the offset previously asserted against its injured Missouri workers' PPD claims while they too claimed the continuing "right" as plan fiduciaries to integrate against PPD and TTD awards under the terms of the benefit plan. The district court allowed no contest or discovery into the motives behind the abandonment and adopted its prior ruling, granting summary judgment in favor of all respondents.

Besides fiduciary concealment and the conduct described above, there was other evidence of dual loyalties cited to the lower courts. When respondents first "reinterpreted" the plan long after the 1946 "freezing" amendment, their decision to allow the integration in Missouri was made without any fiduciary considerations imposed under ERISA Section 404 or earlier common law; the sole reason was to reduce the plan sponsor's costs irrespective of the adverse effect on the beneficiary to whom the fiduciary owed primary loyalty.

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The plan fiduciaries, particularly the EBC's, also took positions and represented interests adverse to the interests of beneficiaries as to plan matters in the state proceedings to assure recoupment of the plan sponsor's benefits, a violation of ERISA Section 404(a)(1)(A)(i) and Section 406(a)(1)(D) and (b)(2), 29 U.S.C. §§1104, 1106. Respondents successfully convinced petitioner Wilken that their integration threats made it futile and senseless for him to pursue his worker's compensation claim. Respondents intimated to petitioner Hechenberger that if he further pursued his worker's compensation claim he might even be required to pay $1,000 of prior benefit plan payments back to respondents.[9]

Petitioner Ramsey attempted to forestall his state claim from proceeding while respondents' conduct was being examined by the instant proceeding to assure he'd get prior federal review of his ERISA claims. After this instant suit was filed and petitioner Ramsey's worker's compensation case was pending, the Southwestern Bell respondents attempted to force him to a state hearing on the plan integration issues before the state agency where they knew *Strohmeyer, supra,* controlled, to give respondents in the instant case a res judicata defense they already raised as to petitioners' class request.[10] The respondent State Director threatened to go ahead and adjudicate.

Not even the Court of Appeals attributed respondents' abandonment announcements to any desire to cease their dual loyalties and adversarial representation, attributing the reason for abandonment solely to a change in Missouri law. Appendix A, p. A-4. Even now respondents do not abandon their dual loyalties but rather on summary judgment assert the plan fiduciaries have the right to reinterpret historical plan terms in derogation of any interests of the beneficiary and solely for the

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[9] Hechenberger deposition transcript pages 13-14, 28, 30; CR page 113.

[10] CR pages 58, 64-69.

interest of the employer notwithstanding ERISA Section 404 and common law loyalty obligations. See *United States v. W. T. Grant, Inc.*, 345 U.S. 629, 632 (1953) (case not moot if defendant free to return to old ways). Nor did respondents propose to abandon their position of plan administrators and fiduciaries; they continue to represent interests adverse to the beneficiaries as to plan issues in workers' compensation proceedings, to "recover" plan monies for the employer,[11] a clear violation of ERISA Section 406(a)(1)(D) and (b)(2), 29 U.S.C. §1106. For example, respondents still integrate plan benefits with state TTD benefits,[12] notwithstanding the Bell system hadn't earlier integrated such benefits if the EBC did not classify the accident as work related for plan purposes.[13]

Neither the district court nor the Eighth Circuit denied respondents' commission of acts revealing dual loyalties or improper adversarial representation, nor did either court suggest that petitioners suffered no damages. They only found no reduced state award. However, petitioners submit on these facts there should have been judicial consideration of fiduciary replacement as an available ERISA remedy. E.g., *Katsaros v. Cody,* 744 F.2d 270, 281 (2nd Cir. 1984) (removal of fiduciaries appropriate for violation of responsibility). Cf. *Powers v. Johnson,* 306 S.W.2d 616, 622-24 (Mo.App. 1957) (removal even though corpus of trust had not been jeopardized, where fiduciary served in an adversarial role to beneficiaries). ERISA §502(a)(3), 29 U.S.C. §1132, is broadly written as to equitable relief.

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[11] McGrath deposition transcript page 35, lines 5-15.

[12] CR page 137.

[13] Exhibit 46, page 2. Plan benefits can be far more generous if the accident is classified work related. Petitioner Wilken's injury was not classified by the EBC as work related under the plan.

This Court is now reviewing the question of broad remedies for fiduciary misconduct in *Massachusetts Mutual Life Ins. Co. v. Russell,* No. 84-9, 53 Law Week 3235. Limited abandonment under the foregoing circumstances and only when challenged and caught, close to the eve of trial, is no absolute cure for past and continuing disloyalty. The summary acceptance of abandonment under these circumstances, without review of respondents' total conduct, encourages the fiduciary buccaneerism the Ninth Circuit condemned and remedied in *Russell v. Massachusetts Mutual Life Ins. Co.,* 722 F.2d 482, 490 (1983), certiorari granted sub nom *Massachusetts Mutual Life Ins. Co. v. Russell, supra.*

The Eighth Circuit's summary affirmance avoids not merely the important *Amax Coal* and *Schneider Moving* dual loyalty issues, but it also avoids the related remedies issue this Court is about to review.

Petitioners submit the Eighth Circuit's finding of mootness solely because no reduced award had yet occurred, was too summary for the issues presented by petitioner in opposition to summary judgment. The issues of dual loyalty, EBC direction of adversarial representation, existence of non-benefit damages (as distinguished from any reduced state award) and fraudulent concealment, all supported by evidence before the district court and on summary judgment factually binding on respondents,[14] deserve consideration. For this reason petitioners submit that the petition be granted or the cause be returned to the Eighth Circuit for informative consideration, or that decision on this petition be held pending decision in *Massachusetts Mutual, supra.*

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[14] *Adikes v. S. H. Kress & Co.,* 398 U.S. 144 (1970) (petitioners as opponents to summary judgment entitled to favorable inferences from exhibits, testimony and affidavits). Below respondents argued *as if* there had been a trial with specific findings against petitioners.

II. Question: Does ERISA Protect Discouragees?

One damage question presented is whether a beneficiary suffers recoverable damage if he was too discouraged by respondents' misconduct to obtain what the lower courts mislabeled a "reduced" award.

Petitioner William Wilken suffered a compensable injury in 1976. Respondents then convinced both Wilken and his then counsel that even if he "won" in the worker's compensation proceeding on every other defense that respondents might choose to assert, petitioner Wilken still couldn't obtain a single penny because the integration credit they would be given by the state for prior benefit plan payments ($6,120.60) exceeded the "best" ($5,767.14) he could ever conceivably be awarded by the state.[15] For Wilken, "reduced" award means *no* award. Information about plan history concealed from the Missouri judiciary was also concealed from petitioner Wilken and his attorney. Wilken and his compensation lawyer were convinced no purpose would be served by petitioner continuing to pursue his state claim, that pursuit would be futile and expensive, leading to his voluntary dismissal.[16]

Respondents' abandonment doesn't help petitioner Wilken and those like him, for the abandonment comes too late. Wilken is barred by Missouri limitations from refiling for compensation, §287.430, R.S.Mo., and his request post-abandonment to reopen his state claim has been ignored by respondents.

Petitioner Wilken's barment is not affected by the recent Missouri statutory amendment. The September 28, 1983 change by the Missouri legislature to prohibit integration completely whether the benefit plan so allows or not, does not affect the

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[15] Exhibit 20.

[16] Wilken deposition transcript pages 33-34, 61-62.

petitioners who were all injured before that date. Date of injury determines which statutory version is to be used. *Evans v. Missouri Utilities Co., supra,* 671 S.W.2d at 813. Nor does the recent state legislative change now have any effect if these ERISA plans truly permitted the contested integration as respondents still insist is now the case under their reinterpretations. *Alessi v. Raybestos-Manhattan, Inc., supra; Shaw v. Delta Airlines,* ____ U.S. ____, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

The district court held discouragees who do not exhaust the state administrative procedure the respondents had previously assured them would be futile, cannot be "actually injured." They have no case or controversy. As a matter of law, then, they can suffer no other extracontractual damages. That is the import of the Eighth Circuit's finding that: "None of the named plaintiffs had been subjected to the integration practice in a compensation proceeding . . .," and that only beneficiaries "who were actually subjected to an offset" can bring an action. Appendix A, p. A-4. The effect of this is to insist that physically injured beneficiaries proceed to try their state claim on all contested issues even though respondents had actively assured them (as Wilken) in advance they would wind up with *nothing* because of the integration threat.

In *Teamsters v. U.S.,* 431 U.S. 324, 365-67 (1977), this Court said it wasn't necessary for protected workers to pursue futile efforts:

> "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to per-

> sonal rebuffs. the same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.
>
> * * *
>
> "Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. ... Such a per se limitation on the equitable powers granted to courts by Title VII would be manifestly inconsistent with the 'historic purpose of equity to 'secur[e] complete justice' and with the duty of courts in Title VII cases 'to render a decree which will so far as possible eliminate the discriminatory effects of the past.' [citation omitted]."

Petitioners Wilken and Hechenberger were told by those who administered the benefit plans that the pursuit of the state claim would be futile because the integration claim exceeded the "best" they could otherwise obtain from the state. It would be worse than futile, for if the injured worker went to hearing he would be saddled with the expenses of trying his state claim, especially the few hundred dollars cost of presenting expert medical testimony on the extent of residual disability. Petitioner Hechenberger was even subtly threatened with the possiblity of paying back some $1,000 in "excess" plan payments. And what

attorney would be willing to represent an injured worker for a contingent fee if he knew in advance there could be no recovery due to the integration?

The Eighth Circuit's requirement that before physically injured beneficiaries are given Congressionally mandated "ready access" to the federal courts[17] to protest plan violation and seek removal of the fiduciaries for dual loyalties and adversarial representation (and damages therefrom), they must first pursue their state claims that all respondents had previously assured them would be futile and result in no award (while at the same time concealing plan history), forces beneficiaries to unnecessarily "deplete energy and resources" for no apparent reason. This Court has said even able-bodied workers should not be required to engage in efforts that wouldn't give full relief. *Clayton v. United Auto Workers,* 451 U.S. 679, 693 n.22 (1981).

Petitioners urge as basis for granting the writ that the rejection of the discouragement doctrine for ERISA beneficiaries, has important national overtones. ERISA cases are trust cases. *Schneider Moving & Storage Co. v. Robbins, supra.* The lower courts' decisions mean the loyalty requirements under common law and ERISA Sections 404 and 406, 29 U.S.C. §§1104, 1106, which this Court said in *Amax Coal, supra,* must be enforced with "uncompromising rigidity," 453 U.S. at 330-34, permit the fiduciaries to threaten wrongful integration and engage in concealment with relative impunity if, as in petitioner Wilken's case, the beneficiary permits himself to become discouraged for too long a time under state law.

Below respondents argued that the discouragement doctrine should be limited to civil rights cases and not extended to protect ERISA beneficiaries from fiduciary misconduct. This is an important question, as important as it was in *Teamsters, supra.* Petitioners submit that Congress intended broader protection of

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[17] ERISA §2(b), 29 U.S.C. §1001(b).

employees than simply in civil rights cases. This Court in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), and in *Schneider Moving, supra,* recognized workers are a specially protected class as plan beneficiaries. To say ERISA discouragees have no claim for damages or equitable relief resulting from dual loyalties of the fiduciary, is to reject protection for part of a protected class. Congressional language in ERISA §502(a)(3)(B) is certainly as broad as Title VII as to equitable remedies. Petitioners submit that the Eighth Circuit's summary refusal to adopt or to even consider the *Teamsters* doctrine to allow remedy to ERISA participants and beneficiaries too-long discouraged by wrongful threats to integrate plan benefits, merits review by this Court.

III. Question: Does ERISA Allow Extracontractual Compensatory Remedies?

The third question sought to be reviewed goes to other extracontractual damages than those arising from discouragement. This Court recently granted certiorari to review the entire issue of ERISA damages arising out of alleged fiduciary misconduct in *Massachusetts Mutual Life Ins. Co. v. Russell, supra.* This Court will also be reviewing the question of damages from fiduciary misconduct in only a slightly different context in *Allis-Chalmers Corp. v. Lueck,* No. 83-1748, 53 Law Week 3235. Respondents' misconduct and disloyalty is no less offensive than in those two cases granted review; respondents' fraudulent concealment makes their conduct far more officious.

Petitioners suffered other losses than benefits. In the instant proceeding all petitioners had to lose time from work, and thereby wages or its equivalent, to attend their depositions taken by respondents. Depositions were of record. Petitioners Hechenberger and Ramsey also lost wages or equivalent attending the state administrative proceedings at which they were frustrated because of the integration threats made at the time. Had respondents not made their wrongful threats and engaged

in acts of disloyalty to the beneficiaries, petitioners Ramsey and Hechenberger would have resolved their state claims a long time prior to abandonment without any attorney representing either in the state proceeding. Notwithstanding the limited abandonment, Ramsey has now suffered and Hechenberger will suffer a reduction in the PPD awards because of the state mandate calling for attorney fees to be paid out of the worker's award. §287.260, R.S.Mo. Petitioners offered evidence attorneys would not have otherwise been retained in such state proceedings but for respondents' threats.[18]

On their state compensation claim petitioners Ramsey and Hechenberger also had to wait until respondents abandoned their threats to integrate with PPD awards, and this did not occur until some year and a half after the instant suit was filed. Petitioner Ramsey would have resolved his state claim before this suit was instituted except for the integration threat. Hechenberger would have otherwise resolved his claim and accepted respondents' earlier $8,000 evaluation (before integration), long before the abandonment was announced. The *amount* of the credit claim was never in issue, so that ordinarily prejudgment interest should be allowable under ERISA for this delay.

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* ____ U.S. ____, 80 L.Ed.2d 428, 438 (1984), this Court stated claims for interest survive the abandonment of the challenged conduct

> "There is some question as to whether petitioners' challenge to the rebate program is properly before us. In 1980, within a month of the entry of the District Court's judgment, the union was decertified as the bargaining representative of Western Airlines' clerical employees.

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[18] Below respondents confused attorneys' fees for this ERISA litigation with separate attorney's fees for representation in work comp proceedings.

> Thus, none of the petitioners is presently represented by the union or required to pay dues to it. Petitioners' claim for an injunction against the rebate scheme would therefore appear to be moot. But petitioners also sought money damages, and damages for an illegal rebate program would necessarily have been in the form of interest on money illegally held for a period of time. That claim for damages remains in the case. The amount at issue is undeniably minute. But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot., *Powell v. McCormack,* 395 U.S. 486, 496-498 (1969)."

In essence, by respondents' threats and the necessity of delaying the work comp resolution until abandonment, respondents were in effect holding up payment of moneys owing to petitioners to the extent of the amount of the challenged credit claim for prior plan benefits paid for the temporary absences. Only non-beneficiaries were enriched by this delay caused by respondents' prior threats. Petitioners submit if the *Ellis* plaintiffs' claims were not mooted by that union's abandonment of further alleged misconduct against them or because of lack of magnitude of the amount or lack of specificity in the damage portion of the pleading,[19] respondents' abandonment in the instant case should not prevent recovery for the interest due the petitioners.

Denying by summary judgment without any discussion all extracontractual damages to petitioners who both challenged the respondents' dual loyalties and sought discovery of information the fiduciaries had theretofore concealed from them, encourages respondents to engage in fiduciary irresponsiblity, for the plan administrators know that if "caught" the worst that

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[19] *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, supra,* 80 L.Ed.2d at 438 n.5. See also Rule 54(c), Federal Rules of Civil Procedure.

will happen is that they will have to abandon their wrongful conduct without recompense for consequential losses, interest and ordinarily non-taxable litigation expenses. Moreover, the respondents will be so very much "ahead" for all the time-barred discouragees such as petitioner Wilken.

This view of damages by the Eighth Circuit, limited solely to the promised benefit no matter the harm, is in conflict with the Ninth Circuit's decision in *Russell v. Massachusetts Mutual, supra.* The Ninth Circuit said

> "In referring to compensatory damages necessary to make a party whole, we are not referring merely to contractual damages for loss of plan benefits. Rather, section 1109 provides for relief that will compensate the injured party for all losses and injuries sustained as a direct and proximate cause of the breach of the fiduciary duty. A contrary reading would conflict with the language of the statute and provide little encouragement to fiduciaries to abide by the act, since the most that could be forfeited in the event of misconduct would be benefits already owed by the plan. More important, a fiduciary could ignore or unreasonably perform its duties and responsibilities with respect to the disposition of claims with virtual impunity and at the sole cost of the participant who has suffered harm as a result of such misconduct. We believe that Congress did not intend to afford such fiduciary immunity." 722 F.2d at 490.

Petitioners submit their third question presents another aspect of the extracontractual damage issue most analogous to that to be reviewed by this Court in *Massachusetts Mutual, supra,* and for that reason the writ should be granted or alternatively this petition held for decision until this Court decides *Massachusetts Mutual.*

CONCLUSION

Petitioners respectfully pray that the Supreme Court issue a Writ of Certiorari to the Eighth Circuit Court of Appeals in the herein matter to review the issues presented herein or alternatively remand for further consideration in light of *Amax Coal* and *Schneider Moving, supra,* or alternatively hold this petition pending decision in *Massachusetts Mutual, supra.*

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Attorneys for petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2266

Richard A. Hechenberger, *Appellant*

William V. Wilken; Charles W. Ramsey,
Appellants

v.

Western Electric Co., Inc.; Western Electric Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Western Electric Sickness and Accident Disability Benefit Plan, Western Electric Co., Inc., Plan Administrator,
Appellees,

Southwestern Bell Telephone Co., Inc., Southwestern Bell Telephone Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan, Southwestern Bell Telephone Co. Plan Administrator,
Appellees

v.

Richard Rousselot, Director,
Division of Workers Compensation,
State of Missouri,

Appellees.

Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: June 11, 1984

Filed: August 28, 1984

Before ROSS, Circuit Judge, HENLEY, Senior Judge, and BOWMAN, Circuit Judge.

ROSS, Circuit Judge.

This appeal arises from an action filed by three employees against their employers, Western Electric Co., Inc., and Southwestern Bell Telephone Co., Inc., and the companies' respective disability benefit plans. The employees challenge a practice followed by the companies in Missouri Workers' Compensatin proceedings, of offsetting certain workers' compensation awards with amounts paid under the disability benefit plans.[1] The employees also claimed that the Missouri statute which authorized the integration of benefits was preempted by the Employee Retirement Income Security Act (ERISA), 29

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[1] The practice of offsetting workers' compensation awards by the amounts paid under a benefit plan is commonly referred to as "integration."

U.S.C. § 1001 *et seq.* Due to an intervening change in state law, and the defendants' abandonment of their integration policies, the district court[2] held that the claims were moot and granted the defendants' motions for summary judgment. On appeal the employees challenge the court's ruling on the mootness issue. We believe that the substantive issues in this case are moot, accordingly we affirm the judgment of the district court.

Discussion

The employees claimed that the Missouri statute which authorized the integration practices was preempted by ERISA. The state statute provided:

> The employer shall be entitled to credit for wages paid the employee after the injury, and for any sum paid to or for the employee or his dependents on account of the injury except for liability under section 287.140.

MO. ANN. STAT. 287.160(3) (Vernon 1965).[3] The Missouri courts had approved the integration practice. *See Strohmeyer v. Southwestern Bell Telephone Co.,* 396 S.W.2d 1 (Mo. Ct. App. 1965). *See also Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 516 (1981) (compensation awards allowed to offset pension benefits). While this action was pending in the district court, the State of Missouri amended its statute to provide:

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[2] The Honorable William C. Hungate, United States District Judge for the Eastern District of Missouri.

[3] This section was amended in 1981 to provide:

> The employer shall be entitled to credit for wages paid to the employee or his dependents on account of the injury or death if such wages were not earned for work performed by the employee after the injury or death.

This modification is not significant for purposes of this appeal.

> The employer shall not be entitled to credit for wages or such pay benefits paid to the employee or his dependents on account of the injury or death.

MO. ANN. STAT. 287.160.3 (Vernon Supp. 1984). Accordingly, the state statute no longer authorized the integration/offset practice.

Upon learning of the change in the state statute the defendants abandoned their practice of claiming offsets in workers' compensation proceedings. Each defendant filed affidavits in the district court stating that they would not claim such offsets against the plaintiffs, nor any other employees with claims pending in workers' compensation proceedings. None of the named plaintiffs had been subjected to the integration practice in a compensation proceeding, *see Wilken v. Southwestern Bell Telephone Co.,* No. 82-0145C(3) slip op. at 2-3 (E.D. Mo. Oct. 17, 1983), nor was there any potential that they, or others, would be subjected to this practice in the future. On this basis the court correctly granted the defendants' motions for summary judgment; the employees' claims were moot.

The normal rule is that when claims of the named plaintiffs are moot before class certification dismissal of the action is required. *See Board of School Commissioners v. Jacobs,* 420 U.S. 128 (1975); *Inmates of the Lincoln Intake and Detention Facility v. Boosalis,* 705 F.2d 1021 (8th Cir. 1983). The employees seek to rely on the "relation back" doctrine to save their claim from mootness. The relation back doctrine provides that where the controversy involving the named plaintiffs becomes moot prior to class certification, the certification can relate back to the filing of the complaint. *See Sosna v. Iowa,* 419 U.S. 393, 402 n.11 (1975). Whether the doctrine should be applied depends upon whether "the issue would evade review." *Id.* Here, there is nothing to prevent an employee who was actually subjected to an offset, prior to the amendment of the state statute, from bringing an action to challenge the former

practice.[4] Accordingly, there is nothing to indicate that the issue will "evade review." *See Bradley v. Housing Authority,* 512 F.2d 626, 629 (8th Cir. 1975). We see no reason why the normal rule requiring dismissal should not apply in this case.

Accordingly, the judgment of the district court will be affirmed.[5]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[4] Precisely such an action is currently pending in the United States District Court for the Eastern District of Missouri, and is docketed as *Clemens v. Southwestern Bell Telephone Co.,* No. 84-0756C(3). Class certification has been requested in that case.

[5] The appellants argue that the case is not moot as they are entitled to attorney's fees and litigation expenses under 29 U.S.C. § 1132 (West Pamphlet 1984) because they successfully prompted the defendants to change their policies. We believe this demand for fees should be presented to the district court in the form of a fee request; it does not save the case from mootness.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2266-EM. September Term, 1984

RICHARD A. HECHENBERGER, *Appellant*

WILLIAM V. WILKEN, ET AL.,
Appellants

VS.

WESTERN ELECTRIC CO., INC., ET AL.,
Appellees,

SOUTHWESTERN BELL TELEPHONE CO., INC.
ET AL.,
Appellees

VS.

RICHARD ROUSSELOT, ETC., ET AL.
Appellees

Appeal from the United States
District Court for the
Eastern District of Missouri

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 12, 1984

APPENDIX C

29 U.S.C. § 1001

Ch. 18

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

* * *

29 § 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

* * *

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

* * *

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

* * *

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

* * *

29 § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Rule 54, FRCP

(c) Demand for Judgment.

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

* * *

R.S.Mo. § 287.260

287.260 Compensation to have priority—not assignable— exceptions. . . . the division or the commission may allow as lien on the compensation, reasonable attorney's fee for services in connection with the proceedings for compensation if the services are found to be necessary and may order the amount thereof paid to the attorney in a lump sum or in installments. All attorney's fees for services in connection with this chapter shall be subject to regulation by the division or the commission and shall be limited to such charges as are fair and reasonable and the division or the commission shall have jurisdiction to hear and determine all disputes concerning the same.

* * *

R.S.Mo., § 287.430

287.430. Limitation as to action—exception.—No proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation,

shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a guardian shall be deemed the termination of the legal disability from minority or incompetency. The statute of limitations contained in this section is one of extinction and not of repose.

Office - Supreme Court, U.S.
FILED
DEC 18 1984
ALEXANDER L. STEVAS
CLERK

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER,
WILLIAM V. WILKEN,
and CHARLES W. RAMSEY,
Petitioners

vs.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DIABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
District Court Order and Memorandum Decision, August 22, 1983	SA-1
District Court Order and Memorandum Decision, October 17, 1983	SA-7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

Richard A. Hechenberger,
et al.,
Plaintiffs,

v.

Western Electric Co., Inc.,
et al.,
Defendants.

ORDER

(Filed August 22, 1983)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the motion of defendant Western Electric Company and defendant Western Electric Sickness and Accident Disability Benefit Plan for summary judgment be and the same is granted.

Dated this 22 day of August, 1983.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

Richard A. Hechenberger,
et al.,
Plaintiffs,

v.

Western Electric Co., Inc.,
et al.,
Defendants.

MEMORANDUM

(Filed August 22, 1983)

This matter is before the Court on the motion of defendants Western Electric Company, Inc., and the Western Electric Sickness and Accident Disability Benefit Plan (hereinafter collectively referred to as defendant Western Electric) for summary judgment dismissing the second amended complaint against them.

This is a suit arising under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, with alleged ancillary jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The principal defendants are Western Electric Company, Inc., the Western Electric Sickness and Accident Disability Benefit Plan, Southwestern Bell Telephone Company, Inc., and the Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan.

The Western Electric Sickness and Accident Disability Benefit Plan provides, among other things, for employee participants to receive payments on account of physical disability to work by reason of accidental injury arising out of and in the

course of employment by Western Electric. *See* Affidavit of J. E. Twomey, ¶ 3, and § 5 of Exh. 2, the Plan, attached thereto. Hechenberger filed a workers' compensation claim under the law of Missouri. At present, this claim is unresolved.

In this action, plaintiffs assert that Western Electric is improperly claiming an offset for the previous payments to plaintiff Hechenberger under the plan that were in excess of legally required workers' compensation healing period benefits. In Hechenberger's case, these excess payments may amount to more than $9,000.00; so, in effect, he would receive no payment for workers' compensation after the offset. This offset is said to violate ERISA. Plaintiff Hechenberger sues to recover the offset amount which he claims as a benefit under the plan.

On June 8, 1983, Plaintiff Hechenberger filed a motion to maintain a class action and for certification of the class. Plaintiffs seek to certify all other employees who are participants in defendants' employee benefit plans and who have had amounts received under workers' compensation awards offset by employee benefit plans. Plaintiff Hechenberger is the only named plaintiff who is an employee of defendant Western Electric and participant under its employee benefit plan (plaintiffs' second amended complaint, ¶ 2(a)).

Defendant Western Electric claims that its plan and practice is authorized by the Missouri Workers' Compensation Act, specifically, Mo. Rev. Stat. § 287.160.3, which provides:

> The employer shall be entitled to credit for wages paid to the employee or his dependents on account of the injury or death if such wages were not earned for work performed by the employee after the injury or death.

In further support of its contention, defendant Western Electric cites *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516-17 (1981), approving its plan and practice of offset.

Plaintiffs claim that defendant Western Electric's plan and practice violates ERISA and that, to the extent Mo. Rev. Stat. § 287.160.3 authorizes the practice, it is preempted by ERISA.

Defendant Western Electric now moves for summary judgment against plaintiff Hechenberger's claim individually, and as a purported class member, claiming that it has never received any offset from plaintiff Hechenberger's workers' compensation claim and has no intention to offset any amounts in pending or future cases that are similar to plaintiff Hechenberger's.

In support of its motion, defendant Western Electric filed an affidavit of Michael McGuire. Mr. McGuire represented Western Electric before the Missouri Division of Workers' Compensation on several claims, including plaintiff Hechenberger's. In his affidavit, Mr. McGuire states that plaintiff Hechenberger never received an award from the Workers' Compensation Board. Mr. McGuire further states that, because plaintiff Hechenberger never received such an award, defendant Western Electric never sought an offset for payments made under its employee benefit plan.

Nowhere in Mr. Hechenberger's affidavit, filed in response to defendant Western Electric's motion for summary judgment, does he claim he either received benefits under the workers' compensation statute or was subject to defendant Western Electric's offset.

Thus, plaintiff Hechenberger's claim that defendant Western Electric's plan and practice of offset against Workers' compensation awards violates ERISA concerns no present controversy as to him individually.

When claims of the named plaintiffs are moot before class certification under Fed. R. Civ. P. 23(c)(1), dismissal of the action is required because there is no case or controversy between the parties under Article III of the Constitution. *Indianapolis School Commissioner v. Jacobs,* 420 U.S. 128, 129 (1975);

Sosna v. Iowa, 419 U.S. 393, 402 (1975); *Bishop v. Committee of Professional Ethics, etc.,* 686 F.2d 1278, 1283 (8th Cir. 1982); *Bradley v. Housing Authority of Kansas City, Mo.,* 512 F.2d 626, 628 (8th Cir. 1975). In particular, *Sosna* noted that the named plaintiff, throughout the course of the litigation, "must show that the threat of injury in a case . . . is 'real and immediate; not . . . hypothetical.' " *Sosna v. Iowa, supra* at 403 (citation omitted).

Plaintiff Hechenberger, in response to defendant Western Electric's motion for summary judgment, claims that, even if plaintiff's claims are moot, summary judgment is improper because other issues remain in the case. Plaintiff Hechenberger claims he is entitled to costs and attorney's fees because, by filing this suit and seeking class certification, he was successful in prompting defendant Western Electric to withdraw its practice of offset. Plaintiff further claims that to grant summary judgment at this stage of the proceeding would frustrate uniform national labor policy.

The Court finds that these contentions are without merit. The import of *Sosna* and *Jacobs* requires that summary judgment be granted, prior to class certification, if the named plaintiff's claim is not a matter of present controversy. Plaintiff Hechenberger is not precluded from asserting these claims in the future.

Plaintiff further argues that the doctrine of "relation-back" should preclude the granting of summary judgment. In *Sosna,* the Court noted that, even though a claim is moot prior to class certification, the certification could "relate back" to the filing of the complaint if the circumstances of the particular case required review of the underlying issues. *Sosna v. Iowa, supra* at 402 n.11.

However, in the instant case and in *Bradley, supra,* the issues would not evade review if the "relation-back" doctrine was not applied. In the affidavits of Mr. McGuire and Mr. John E.

Twomey, secretary of the employee benefit committee of Western Electric, both stated that defendant Western Electric would cease implementing the plan and practice of offset to all pending and future cases similar to plaintiff Hechenberger's.

In order to prevail on a motion for summary judgment, the burden is on the moving party to establish beyond controversy that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Roberts v. Browning,* 610 F.2d 528, 531-32 (8th Cir. 1979). This Court is required to view the facts in a light most favorable to the non-moving party and to give that party the benefit of reasonable inferences drawn from the underlying facts. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 153-59 (1970); *Goodman v. Parwatikar,* 570 F.2d 801, 803 (8th Cir. 1978). "Unless the pleadings and supporting documents disclose beyond any doubt the absence of a genuine issue of fact, summary judgment should not be entered." *Evans v. McDonnell Aircraft Corp.,* 395 F.2d 359, 362 (8th Cir. 1968).

There are no genuine issues of material fact regarding plaintiff Hechenberger's individual claim against defendant Western Electric. Because the named plaintiff's claim is not presently in controversy, defendant Western Electric's motion for summary judgment will be granted.

Dated this 22 day of August, 1983.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

William V. Wilken, et al.,
Plaintiffs,

v.

Southwestern Bell Telephone
Co., Inc., etc., et al.,
Defendants.

ORDER

(Filed October 17, 1983)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that Southwestern Bell's general motion for summary judgment be and the same is granted.

IT IS HEREBY FURTHER ORDERED that defendant-intervenor Rousselot's motion for summary judgment be and the same is granted.

IT IS HEREBY FURTHER ORDERED that plaintiff's motion for class certification be and the same is denied as moot.

IT IS HEREBY FURTHER ORDERED that Southwestern Bell's motion for summary judgment on plaintiff Wilken's claims be and the same is denied as moot.

IT IS HEREBY ORDERED that this action be and the same is dismissed without prejudice, and the requirements of this Court's order of October 7, 1983, are rendered moot.

Dated this 17th day of October, 1983.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

William v. Wilken, et al.,
Plaintiffs,

v.

Southwestern Bell Telephone
Co., Inc., etc., et al.,
Defendants.

MEMORANDUM

(Filed October 17, 1983)

This matter is before the Court on the motion of defendants Southwestern Bell Telephone Company, Inc., and Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan (hereinafter collectively referred to as "Southwestern Bell") for summary judgment; the motion of Southwestern Bell for summary judgment on plaintiff Wilken's claims specifically; the motion of intervenor-defendant Richard Rousselot for summary judgment; and plaintiffs' motion for class certification. The lawsuit arises under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, with alleged ancillary jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

Plaintiffs Wilken and Ramsey are participants in Southwestern Bell's employee welfare benefit plan, which provides for payments to employee participants for physical disability to work due to accidental injury arising out of and in the course of employment by Southwestern Bell. Plaintiffs complain that defendants have improperly maintained a practice, in regard to employees who receive payments under the Missouri Workers' Compensation Law, Mo. Rev. Stat. §§

287.010, et seq., of integrating the plan's weekly benefit payments for absence paid in excess of that provided for healing period and absences provided under the Workers' Compensation Law, against the workers' claims for residual permanent injury. *See* Second Amended Complaint. Plaintiffs contend that this policy violates ERISA.

Originally, this action also contained claims by one Richard A. Hechenberger that a similar plan by Western Electric Company, Inc., and Western Electric Sickness and Accident Disability Benefit Plan (hereinafter collectively referred to as "Western Electric"), also violated ERISA. However, summary judgment was entered for Western Electric on August 22, 1983, on the basis of mootness; then-plaintiff Hechenberger had never received an award from the Workers' Compensation Board, and thus Western Electric never sought an offset for payments under its employee benefit plan. Additionally, Western Electric had filed affidavits stating that it would cease its offset practice as to all pending and future cases similar to Mr. Hechenberger's.

For similar reasons, the Court will grant Southwestern Bell's general motion and defendant Rousselot's motion for summary judgment. Neither of the two named plaintiffs has ever received an award from the Workers' Compensation Board. Consequently, no offset has been made. While defendants have concededly claimed entitlement to such an offset with respect to both plaintiffs, the issue has never become ripe. Plaintiff Ramsey's claim is still pending before the Workers' Compensation Board, and plaintiff Wilken's claim was withdrawn after he was informed of Southwestern Bell's intent to offset.

Furthermore, defendants have filed affidavits in support of their motion. Affiant James B. Kennedy, an attorney for Southwestern Bell Telephone Company, states that no formal hearing had been held on Mr. Ramsey's workers' compensation claim, and that he has advised the administrative law judge assigned to the case of his client's decision not to assert a claim

for excess payments during Mr. Ramsey's temporary total disability. Affiant also submitted a copy of the amended answer specifically stating that the credit would not be claimed.

Affiant Leo E. Eickhoff, Jr., also an attorney for Southwestern Bell, filed an affidavit stating that Southwestern Bell would not claim credit under Mo. Rev. Stat. § 287.160.3 against permanent partial awards or settlements in pending or future cases, for amounts paid to employees during a period of temporary total disability in excess of the statutory rate of compensation for temporary total disability. Affiant states that a letter to that effect, of which a copy is attached, was mailed to the Director of the Division of Workers' Compensation, with an effective date of August 26, 1983.

Intervenor-defendant Rousselot, the Director of the Division of Workers' Compensation, Department of Labor and Industrial Relations, State of Missouri, submitted his own affidavit along with his motion for summary judgment. He states that he received a letter from Mr. Eickhoff informing him of the decision to cease claiming offset credit, and that the legal advisors and administrative law judges had been informed of the "unconditional" change of position.

In accordance with the reasoning set forth in this Court's order of August 22, 1983, granting Western Electric's motion for summary judgment, the Court finds that the named plaintiffs' claims do not set forth a present controversy as to them individually. The action will therefore be dismissed.

Southwestern Bell's motion for summary judgment as to defendant Wilken and plaintiffs' motion for class certification are moot.

Dated this 17th day of October, 1983.

/s/ William L. Hungate
United States District Judge

Supreme Court, U.S.
FILED
JAN 14 1985
CLERK

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER, et al.,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SOUTHWESTERN BELL RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a finding of mootness based upon the cessation of challenged conduct due to an intervening change in the law presents an issue worthy or review, particularly when the contentions presented in opposition to mootness were either not fairly presented to the courts below or are unsupported by the record.

2. Whether the contention that the *Teamsters* doctrine saves this case from mootness when the rationale for that doctrine is absent and the issue presented was never ripe for review presents an issue worthy of review.

3. Whether the contention that claims for unpleaded special damages and interest on an unliquidated sum saves a case from mootness presents an issue worthy of review.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	8
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	12
Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975)	5
Brown v. Hotel and Restaurant Employees, ____ U.S. ____, 82 L.Ed.2d 373 (1984)	13
Continental Bank & Trust Co. v. American Bonding Co., 630 F.2d 606 (8th Cir. 1980)	16
Cowan v. Southwestern Bell Telephone Co., 529 S.W. 2d 485 (Mo.App. 1975)	5
De Shields v. U.S. Parole Commission, 593 F.2d 354 (8th Cir. 1979)	15
Ellis v. Brotherhood of Railroad, Airline and Steamship Clerks, ____ U.S. ____, 80 L.Ed.2d 428 (1984)	15, 17
Golden v. Zwickler, 394 U.S. 103 (1969)	5

Hechenberger v. Western Electric Co., Inc., 570 F.Supp. 820 (E.D.Mo. 1983) 3, 17, 18

Hechenberger v. Western Electric Co., Inc., 742 F.2d 453 (8th Cir. 1984) 8

Hull v. Southwestern Bell Telephone Co., 565 S.W.2d 809 (Mo.App. 1978) 5

Katsaros v. Cody, 744 F.2d 270 (2d Cir. 1984) 11

Massachusetts Mutual Life Insurance Co. v. Russell, No. 84-9, ____ U.S. ____, 83 L.Ed.2d 29 (1984) ... 17

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 10

North Carolina v. Rice, 404 U.S. 244 (1971) 5

Rogers v. Lodge, 458 U.S. 613 (1982) 8

Russell v. Massachusetts Mutual Life Insurance Co., 722 F.2d 482 (9th Cir. 1983), *cert. granted,* 83 L.Ed.2d 29 (1984) 17, 18

Schneider Moving & Storage Co. v. Robbins, ____ U.S. ____, 80 L.Ed.2d 366 (1984) 10

Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972)6, 8, 15, 17

Sosna v. Iowa, 419 U.S. 393 (1975) 5

Strohmeyer v. Southwestern Bell Telephone Co., 396 S.W.2d 1 (Mo.App. 1965) 5

United Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 12

United States v. Alaska Steamship Co., 253 U.S. 113 (1920) 6

United States v. W.T. Grant Co., 345 U.S. 629 (1953) .. 7

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944) 7

Western Casualty & Surety Co. v. Southwestern Bell Telephone Co., 396 F.2d 351 (8th Cir. 1968) 14

Other Authorities:

U.S. Const. Art. III 5

29 U.S.C. §1109 18

29 U.S.C. §1132 2

29 U.S.C. §1132(g) 3, 18

29 U.S.C. §1144(a) 13

Fed. R. Civ. P. 9(b) 9

Fed. R. Civ. P. 9(g) 15

Fed. R. Civ. P. 19 11

Fed. R. Civ. P. 30(d) 15

Fed. R. Civ. P. 54(c) 15

Missouri Revised Statutes
§287.160.3 (Supp. 1979) 2, 5, 10

Missouri Ann. Statutes
§287.160.3 (Vernon Supp. 1984) 5

Sup. Ct. R. 17.1(c) 7

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER, et al.,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SOUTHWESTERN BELL RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Richard A. Hechenberger, William V. Wilken, and Charles W. Ramsey have asked this Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on August 28, 1984. The Court of Appeals affirmed the District Court's dismissal of petitioners' action as moot.[1] Because the

[1] The Eighth Circuit's opinion is reported at 742 F.2d 453, and is reprinted in Appendix A (App. A) to the Petition for Writ of Certiorari (Pet./Cert.) The decisions of the District Court are reported at 570 F.Supp. 820, 823-25, reprinted in the supplemental appendix (Supp. App.) at SA-2—SA-6, and at 573 F.Supp. 71, reprinted in the Supplemental Appendix at SA-8—SA-10.

decision below is correct and does not raise any questions warranting review by this Court, Respondents Southwestern Bell Telephone Company, Inc. (the Company) and the Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan (the Plan), also collectively referred to hereinafter as "Southwestern Bell respondents," respectfully urge this Court to deny the pending petition.

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is inaccurate and omits pertinent facts. Therefore Southwestern Bell respondents deem it necessary to make the following statement of the case.

This action was filed in the Eastern District of Missouri as a purported class action on January 29, 1982. Jurisdiction of the District Court was invoked, in part, pursuant to Section 502 of the Employee Retirement Income Securities Act (ERISA), 29 U.S.C. §1132. The complaint was amended twice, but the issue presented remained the same: petitioners challenged, as a violation of ERISA, a practice of integrating weekly benefit payments under the Plan for absence paid in excess of that required under the Missouri Workers' Compensation Law for healing period and absences (referred to under the law as "temporary total disability") against awards for residual permanent injury (referred to under the law as "permanent partial disability"). *See* Supp. App., pp. SA-8—SA-9. Offsets against permanent partial disability awards were the only offsets petitioners challenged. The challenged offsets had been authorized by a then existing section of the Workers' Compensation Law, Mo.Rev.Stat. §287.160.3 (Supp. 1979). *See* App. A, p. A-3.

In their second amended complaint, petitioners alleged that the challenged offset practice was not authorized by the terms of the Plan; that respondents violated various ERISA notice requirements by the manner in which the offset was claimed; that the offset amounted to a denial of ERISA benefits; that Plan

fiduciaries violated ERISA by asserting the offset and delegating authority pertaining to benefit decisions; and that ERISA pre-empted that portion of the Missouri Workers' Compensation Law under which the offset was claimed.[2] Petitioners sought injunctive and declaratory relief; imposition of constructive trusts; accountings and interest thereon; punitive damages; attorneys' fees and costs pursuant to 29 U.S.C. §1132(g); and further relief as deemed proper.[3]

Petitioners filed a motion for class certification on June 8, 1983, one week after the District Court had ordered them to do so.[4] A class certification hearing was held pursuant to Wilken's and Ramsey's motion on August 29, 1983.[5]

Prior to the certification hearing, the Company and the Plan moved for summary judgment on the grounds of mootness and lack of ripeness, based upon affidavits and exhibits establishing that the offset at issue had never been taken against a permanent partial award or settlement as to either petitioner Wilken or Ramsey, nor would such an offset be asserted by the Company in any pending or future Missouri Workers' Compensation case. Supp. App., pp. SA-9—SA-10. The announcement was based, in part, upon an intervening change in the state law: the statute authorizing the offset petitioners challenged was to be repealed. *See* App. A, pp. A-3—A-4 and footnote 6, *infra.* On October 17, 1983 the District Court granted the motion for sum-

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[2] Second Amended Complaint, pp. 5-14. The complaint is contained in the clerk's record, cited as "CR" in the Petition at p. 6 n. 1. The foregoing portions of the second amended complaint are at CR, pp. 22-31.

[3] CR, pp. 31-33. A review of the relief petitioners sought is also set forth in *Hechenberger v. Western Electric Co., Inc.*, 570 F.Supp. 820, 822 (E.D.Mo. 1983).

[4] CR, pp. 83 and 89-91.

[5] CR, p. 186.

mary judgment and denied the motion for class certification. Supp. App. p. SA-7. The Court of Appeals for the Eighth Circuit affirmed, holding that the case was moot. App. A, pp. A-2—A-5.

REASONS FOR DENYING THE WRIT

I.

The writ should be denied because the intervening change in the state law and cessation of the challenged conduct renders all issues fairly presented below moot.

Petitioners characterize the issue presented below as broad, while they assert that the effect of respondents' actions is limited. Neither contention is accurate. When correctly presented, it is clear that petitioners' claim presents nothing worthy of review by this Court.

Read as a whole, the Petition gives the impression that petitioners launched a broad spectrum of challenges with regard to integration of Plan and law benefits. In fact, the key issue presented in both the District Court and the Court of Appeals was quite narrow: whether it was lawful under ERISA to offset awards for permanent partial injuries under the Missouri Workers' Compensation Law with amounts paid under the Plan that were in excess of the amounts required for temporary total disability under the law. Because the Company announced it would no longer engage in this offset practice, and because neither Wilken nor Ramsey had an award for permanent partial disability reduced by such an offset, their claims became moot. The intervening change in the state law and the Company's change in policy ended the controversy between the parties. The issue upon which their entire case was to turn was no longer present.

The Court of Appeals decision was correct under this Court's prior decisions. The power of federal courts to adjudicate causes of action is confined by the Constitution to "cases" or "controversies". U.S. Const. Art. III. It is well settled that a "case" or "controversy" must exist at all stages of litigation and not merely at the time a complaint is filed. *Golden v. Zwickler,* 394 U.S. 103, 108 (1969). It is equally well settled that federal courts are prohibited from adjudicating moot claims. *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). Once circumstances arise which terminate the case or controversy between the parties, the doctrine of mootness requires that the action be dismissed as moot. *Sosna v. Iowa,* 419 U.S. 393, 399 (1975). As a general rule, the mootness doctrine requires the same result in a class action if the claim of the class representative become moot prior to certification of the class. *Board of School Commissioners v. Jacobs,* 420 U.S. 128, 130 (1975).

The conduct petitioners challenged was previously sanctioned by a provision in the Missouri Workers' Compensation law which allowed an employer a credit for certain sums paid an employee on account of an injury. *See* Mo.Rev.Stat. §287.160.3 (Supp. 1979). The Missouri courts construed this section of the compensation law to allow an employer to claim a credit for amounts paid under a benefit plan in excess of temporary total disability payments required under the law, against awards under the law for permanent partial disability. *Hull v. Southwestern Bell Telephone Co.,* 565 S.W.2d 809 (Mo.App. 1978); *Cowan v. Southwestern Bell Telephone Co.,* 529 S.W.2d 485 (Mo.App. 1975); *Strohmeyer v. Southwestern Bell Telephone Co.,* 396 S.W.2d 1 (Mo.App. 1965). Effective September 28, 1983, the provision allowing the offset petitioners challenged was amended to prohibit the employer from seeking "credit for wages or such pay benefits paid to the employee or his dependents on account of the injury or death." Mo.Ann.Stat. §287.160.3 (Vernon Supp. 1984).

The Court of Appeals found that the challenged offset practice was abandoned "upon learning of the change in the state statute."[6] App. A, p. A-4. The court further found that none of petitioners had been subjected to the offset in a workers' compensation proceeding.[7] *Id.* Because it was the challenged offset that was the focus of petitioners' entire cause of action, the intervening change in the law[8] and the Company's renunciation of the offset, prior to using it to reduce whatever permanent partial award Wilken or Ramsey might have received, rendered their claims moot. *Id.* At that point, no class had been certified, and the Court of Appeals accordingly held that the class claims were also moot. *Id.*

The court below merely applied this Court's well-settled mootness principles to the facts of this case. The offset petitioners challenged had never been applied to them, and because the statute authorizing the offset had been amended and the Company renounced claiming the offset, no "injury" would

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[6] This finding of fact is amply supported by the record with respect to the Company which, as employer, had previously claimed the offset pursuant to the repealed statute. *See* Affidavit of Leo Eickhoff, CR pp. 141-143; Letter to Rousselot, CR p. 144.

[7] This factual finding is also fully supported by the record. Petitioner Wilken withdrew his compensation claim after consultation with his attorney. Wilken Deposition Transcript, p. 21. Petitioner Ramsey did not have a hearing on his claim, received no award, and thus had no offset taken against the award. Class Certification Hearing Transcript, p. 21; Affidavit of James Kennedy, CR, pp. 133-134.

[8] An intervening statutory amendment which eliminates the allegedly offensive provisions of a statute renders an action challenging the statute moot. *See Socialist Labor Party v. Gilligan*, 406 U.S. 583, 585 (1972); *United States v. Alaska Steamship Co.*, 253 U.S. 113, 115-16 (1920). The Court of Appeals' decision fully comports with these decisions.

occur. App. A, p. A-4. Considering the foregoing, the Court of Appeals correctly held that petitioners' claims were moot.[9]

Petitioners, in an effort to save their case from mootness, now belatedly add to their case herein a claim they never presented below. They attempt to portray the offset issue as broader than it was, by arguing that respondents are violating ERISA by continuing to integrate Plan benefits with state law temporary total disability benefits, thereby "recovering" Plan benefit payments for the Company.[10] Pet./Cert. at 9 and 11.

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[9] See App. A, pp. A-4—A-5. Petitioners do not attempt to demonstrate the inapplicability of the cases cited by the Court of Appeals in support of its holding. They merely assert in summary manner that insistence on the legality of the integration practice and the freedom to return to it means that this case is not moot. Pet./Cert. at 8 n.8 and 11. The cases they cite are inapplicable because in this case the resumption of the challenged conduct does not depend solely on the company's capricious actions by which it is free to return to its old ways. *See, e.g., United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953); *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944). Unlike the situation in those cases, the Company could return to the challenged offset practice only if either Wilken or Ramsey is reinjured, files a claim for workers' compensation, the Company claims the offset in violation of its prior announced renunciation and in violation of the new Missouri statute prohibiting the offset, and the Missouri Division of Workers' Compensation decides to allow the offset, again in violation of the new statute. Petitioners do not show how the Company could resume the challenged offset practice solely on its own caprice. Thus, they totally fail to demonstrate how the decision of the Court of Appeals conflicts with applicable decisions of this Court. *See* Supreme Court Rule 17.1(c).

[10] Petitioners cite the McGrath deposition transcript at p. 35, lines 5-15 as support for their assertion that respondents "recover" Plan benefit payments in workers' compensation proceedings. Pet./Cert. at 11 n.11. Petitioners fail to inform this Court that, in response to their own counsel's questioning, Mr. McGrath explained that by "recover" he meant that the Company tried to give its workers the better of Plan or law benefits. If the Plan paid more than the law required, the worker kept the difference: the Company did not go against the worker to recover the differnce. McGrath Deposition Transcript, p. 35, lines 22-25 and p. 36, lines 1-22.

As stated above, integration of Plan benefits with state law temporary total disability benefits was never an issue in this case. Petitioners not only did not challenge this offset practice in any of the three complaints they failed in the District Court, they even announced to the Eighth Circuit that offsets against temporary total disability benefits were not an issue in this case. Brief for Appellants at 6, *Hechenberger v. Western Electric Co., Inc.*, 742 F.2d 453 (8th Cir. 1984). Now, for the first time, and contrary to their representation to the Court of Appeals, they assert that offsets against temporary total disability awards violate ERISA under certain circumstances. *See* Pet./Cert. at 11.

A claim that was not adequately presented in the courts below and which was not considered there cannot present a "case" or "controversy" when other issues are moot. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972). In an analogous context, this Court has held that it ordinarily will not review a contention neither raised nor addressed in the courts below. *E.g. Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). It follows that this Court should not entertain an issue petitioners specifically disavowed in the Court of Appeals.

By implying that their challenge in the courts below was broader than it actually was, petitioners are able to characterize the result of the Company's renunciation of the offset at issue as "limited". In fact, the renunciation was as broad as the issue presented: there was nothing left in controversy between the parties.

In a similar manner, petitioners now assert that Southwestern Bell respondents perpetrated a fraud on the Missouri courts in the mid-1960's. Pet./Cert. at 7-8. They cite nothing in the record to support such a serious allegation, nor was this claim ever pleaded as actionable conduct in their second amended

complaint filed below.[11] Their recitation of what they claim to be the Plan's history, *see* Pet./Cert. at 6-7, is simply irrelevant: none of the exhibits cited in support of this contention establish that the Southwestern Bell Employee Benefits Committee ever adopted, as its interpretation of the Southwestern Bell Plan's provisions, the recommendations of AT & T.[12] Nor does it add anything to Respondent's unpleaded fraud claim.

Petitioners' assertion that Southwestern Bell's Employees Benefits Committee violated ERISA by taking positions and representing interests adverse to beneficiaries in workers' compensation proceedings is also without support in the record. In fact, the record reveals that since 1972, the Benefits Committee had no responsibility for making company decisions in workers' compensation cases, and did not involve itself with claiming the

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[11] CR, pp. 22-31. Even under federal notice pleading, the circumstances constituting fraud must be alleged with particularity. Fed.R.Civ.P. 9(b). The complaint is totally devoid of any fraud allegations, either particular or general.

[12] An AT & T witness, Therese Pick, Director of Benefit Administration and Secretary of the Employees' Benefits Committee of AT & T, testified that the various Bell Systems companies are not required to follow AT & T's recommendations on benefit plans; that AT & T Serial Letters, such as Serial 124, issued in 1942, were sent to the companies merely so that they would have the beneift of AT & T's thoughts on the matter; that the sickness and accident benefits plans of the various companies, while similar, are separate company plans; and that an AT & T Benefits Committee communique, although binding on AT & T, is only a suggestion or recommendation as to the Benefits Committees of the other companies. Pick Deposition Transcript, p. 74, lines 6-24; p. 81, lines 7-20; p. 83, lines 3-10; p. 90, lines 1-18. Petitioners' assertions that AT & T's plan "interpretation" somehow interpreted the Southwestern Bell Plan is simply contrary to the testimony of AT & T's witness. Furthermore, the exhibits cited in footnote 5 of the Petition either do not involve the Company and its Plan, or do no more than show that it was suggested that AT & T's recommendation be implemented.

challenged offset.[13] Workers' compensation claims were not submitted to the Benefits Committee: only final settlements of such claims were submitted.[14] Moreover, the attorneys who defended the workers' compensation claims represented the Company, not the Benefits Committee.[15]

Finally, the repealed Missouri statute allowing the offset did so with reference to the employer. *See* Mo.Rev.Stat. §287.160.3 (Supp. 1979). The Company is the employer of Wilken and Ramsey, not the Benefits Committee. Under the repealed statute, therefore, only the Company could claim and take the offset.

The foregoing discussion demonstrates the inapplicability of *Schneider Moving & Storage Co. v. Robbins*, ____ U.S. ____, 80 L.Ed.2d 366 (1984) and *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), principally relied upon by petitioners. *See* Pet./Cert. at 5, 12, 16-17, and 20-21. There is simply no factual basis for petitioners' repeated assertions of "dual loyalty" and "fiduciary misconduct." Quite to the contrary, both Wilken and Ramsey testified that they received all benefits due them under the Plan, and neither of them had any claim for additional Plan benefits.[16] The Benefits Committee had directed the Plan to pay them these benefits, and had also invited Wilken to appeal its decision to treat his claim for Plan benefits as a

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[13] Brockman Deposition Transcript, pp. 56 and 76.

[14] McGrath Deposition Transcript, p. 43.

[15] CR, pp. 133 and 135-136; Hollie Deposition Transcript, pp. 5-6 and 11.

[16] Wilken Deposition Transcript, p. 50; Ramsey Deposition Transcript, pp. 17-18; Class Certification Hearing Transcript pp. 20-21 and 46.

"sickness" rather than an "accident".[17] Wilken did not appeal.[18] The record in this case establishes that the Benefits Committee fully discharged its fiduciary duties under the Plan.

The Eighth Circuit was not in error, therefore, for not considering fiduciary removal as an available ERISA remedy, as petitioners contend. Pet./Cert. at 11. There was no basis in the record for granting such a remedy, unlike the situation in *Katsaros v. Cody,* 744 F.2d 270 (2d Cir. 1984). In that case, there was evidence of two imprudent loans of plan funds approved by plan fiduciaries. *Id.* at 281. In this case, the record reveals that the members of the Employee Benefits Committee fully discharged their fiduciary duties by paying Wilken and Ramsey their Plan benefits and that the committee members were not involved in workers' compensation proceedings. Moreover, the members of the Benefits Committee are not parties to this present action, unlike *Katsaros.* The courts below could not have considered their removal because they are not parties to this action. *See* Fed.R.Civ.P. 19.

There is no basis for petitioners' contention that the Court of Appeals erred in holding that this case is moot. They present no issue worthy of review by this Court.

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[17] Affidavit of Mary Thompson, CR, pp. 138-139; 8/17/76 letter to Wilken (Southwestern Bell Exhibit A, p. 5).

[18] McGrath Deposition Transcript, p. 40.

II.

The writ should be denied because the rationale for the *Teamsters* doctrine is inapplicable to this case and the issue presented in not ripe for review.

Petitioners' contention that the "discouragement" doctrine is applicable to this case misconstrues the basis for this Court's holding in *United Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The doctrine announced in that case arose out of an action filed pursuant to Title VII. That statute prohibits discrimination in employment.

In this case, on the other hand, ERISA does not prohibit integration of ERISA benefits and state law benefits. Integration of ERISA regulated plan benefits with those payable under state law is lawful, even when integration results in the reduction or denial of ERISA benefits. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-21 (1981). In this case, Wilken admitted that he received his ERISA benefits and had no claim for additional sums against the Plan.[19] He was not "discouraged," therefore, from applying for and receiving ERISA benefits. His claim was not based upon a reduction or denial of ERISA benefits, but upon a potential reduction or denial of a possible permanent partial disability award under the state workers' compensation law.

Teamsters did not hold that an employee who had received all of his ERISA benefits had a cause of action under ERISA because he was "discouraged" from pursuing a possible award of workers' compensation. The holding of *Teamsters* was premised upon the fact that the statute involved prohibited the very conduct which "discouraged" persons from applying for positions with an employer. ERISA does not prohibit integration: it allows it. *Alessi, supra.* Furthermore, the "discourage-

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[19] Wilken Deposition Transcript, pp. 26, 49, 50; Class Certification Hearing Transcript, p. 46.

ment" doctrine appellants seek to engraft upon this case is inapplicable because it arises out of cases involving parties in unequal bargaining positions. Wilken, however, had both counsel and a forum to protect his interests, and was before the forum with a filed claim. He could have proceeded with his claim and challenged the offset. He did not do so. Instead, he withdrew his claim after consultation with his attorney, and never asked the Division of Workers' Compensation to withdraw the dismissal of his claim.[20] The concern of *Teamsters* with protecting persons in unequal bargaining positions is simply not applicable to this case.[21]

Moreover, the decision of the Court of Appeals is correct in light of this Court's recent decision in *Brown v. Hotel and Restaurant Employees,* ____ U.S. ____, 82 L.Ed.2d 373 (1984). In that case, this Court vacated the judgment of the Seventh Circuit that held, in part, that a New Jersey statute was preempted by ERISA, 29 U.S.C. §1144(a). This Court held that the pre-emption issue was not ripe for review because, although the state commission had asserted its authority to impose a sanction under the challenged statute on a union, it had never done so, and this Court was "presented with no concrete application of state law." *Id.* at 390. In the same manner, the Company's request for the challenged offset pursuant to the now repealed Missouri statute in Wilken's compensation proceeding was not ripe for review because the Company never imposed the offset

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[20] Wilken Deposition Transcript, pp. 21-22.

[21] That concern is even less applicable here because Wilken had three forums available: the Division of Workers' Compensation, arbitration under the collective bargaining agreement (*See* 1980 Agreement of General Application Between Communication Workers of America and Southwestern Bell, Art. VII, Pensions, Disability Benefits, and Death Benefits) and the Employers Benefit Claims Review Committee (*see* Exhibit 1 attached to Southwestern Bell's answers to plaintiff's interrogatories at §3, ¶3). The foregoing sections are printed in Southwestern Bell's Appendix.

on whatever permanent partial disability award, if any, Wilken might have obtained. *See* App. A, p. A-4. Under *Brown,* the Court of Appeals' decision was correct, and petitioners present no issue worthy of review by this Court.

III.

The writ should be denied because claims for damages never properly presented below do not save this case from mootness.

Petitioners argue that their claims for "non-benefit damages" and "extra contractual compensatory damages," including prejudgment interest, were not mooted by the cessation of the offset practice they challenged. Pet./Cert. at 11-12 and 17-20. Most of these claims were never pleaded below, and were injected into this case only as an afterthought to avoid mootness.

Petitioners list the following as damages they now claim: time (wages) lost from work to attend depositions taken in this case; wages Hechenberger and Ramsey lost to attend state workers' compensation proceedings, and attorneys fees incurred in those proceedings; and prejudgment interest on the amount of offset claimed. Pet./Cert. at 17-18. With the exception of prejudgment interest, none of these items was pleaded or claimed in the second amended complaint.

The "extra-contractual" damages claim petitioners contend saves this case from mootness was never pleaded in their second amended complaint, nor was this claim raised in the counter affidavit of petitioners' counsel and the other material filed in opposition to respondents' summary judgment motion.[22] When

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[22] CR, pp. 145-148. Furthermore, the damages claimed are special damages. Petitioners admit that they seek "non benefit" and "extra-contractual" damages. It is clear that such a claim is for special damages. *See, e.g., Western Casualty & Surety Co. v. Southwestern Bell Telephone Co.,* 396 F.2d 351, 356 (5th Cir. 1968) (attorneys'

all issues litigated below are moot, save one that received no attention in petitioners' complaint or affidavit and other material filed in response to the summary judgment motion, that issue does not save the case from mootness. *Social Labor Party v. Gilligan, supra.* This belated claim does not save the case from mootness.[23]

In addition, the claim for wages lost for time petitioners spent in depositions taken in this case is not a proper element of damages. It is axiomatic that a party who initiates a lawsuit cannot claim as damages expenses or losses incurred by reason of discovery properly engaged in by his opponent.[24]

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fees). As such, they must be specifically stated in the pleadings. Fed.R.Civ.P. 9(g). Nowhere in the second amended complaint did petitioners allege wage losses or attorneys' fees incurred in state compensation proceedings. They cannot now attempt to inject these unpleaded claims into this case in order to avoid mootness. *See De Shields v. U.S. Parole Commission,* 593 F.2d 354, 356 (8th Cir. 1979) (compensatory damage claim did not destroy mootness of injunction claim when malice or personal involvement necessary to recover had not been alleged).

[23] Petitioners' reliance on *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* ____ U.S. ____, 80 L.Ed.2d 428 (1984) for the proposition that their claims are not moot because of a lack of specificity in the damage portion of their pleading is misplaced. In *Ellis* there was a claim for "monetary damages for injuries sustained as a result of defendants' unlawful and unwarranted interference with and deprivation of their constitutional, civil, statutory and contractual rights." *Id.* at 438 n.5. No such claim for compensatory damages is contained in petitioners' second amended complaint. Moreover, Rule 54(c) is inapposite. Judgment was rendered in favor of respondents, not petitioners.

[24] Petitioners do not contend that the depositions they attended were conducted in bad faith, so as to justify sanctions against respondents. *See* Fed. R. Civ. P. 30(d). Nor does the record reveal any such claim was made below.

Petitioners' argument that their claim for prejudgment interest avoids mootness is also infirm. They argue that because the amount of the offset claimed was not an issue, prejudgment interest ordinarily would be allowable. Pet./Cert. at 18-19. The amount of the offset claimed, however, is not what was at issue. The Company contested Ramsey's claim that he had sustained a temporary total or permanent partial disability as a result of his accident.[25] The Company also contested Wilken's claim, denying that he had suffered a job-related accident and further denying that he suffered any permanent partial or temporary total disability.[26] Thus, neither petitioner was assured of any award of compensation. Only if they received an award equal to or greater than the offset would the amount of offset claimed be the same as the amount of offset actually allowed. What petitioners really sought was that amount of a potential state workers' compensation award that would not have been paid because the offset at issue was allowed the Company. If the amount of the award had been less than the offset asserted, it would be the amount of the award that would be sought here, not the amount of the asserted offset.

The foregoing demonstrates that prejudgment interest would not be allowed in this case. The compensation claims were unliquidated and Missouri law has no provision authorizing interest on potential and unliquidated claims for compensation. *See Continental Bank & Trust Co. v. American Bonding Co.*, 630 F.2d 606, 612 (8th Cir. 1980).

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[25] Exhibit 11

[26] Exhibit 21

Petitioners' argument is further flawed because it assumes not only that there was a sum certain (the amount of offset claimed), but that Southwestern Bell respondents "held" it. In fact, the record establishes that the Plan held nothing. It had paid all ERISA benefits owed. The Company likewise held nothing. It contested the compensation claims of Wilken and Ramsey. Until those claims were reduced to awards, Wilken and Ramsey were not entitled to anything. In Wilken's case especially, if the Administrative Law Judge had determined that he did not have a job-related injury, he would have received no award of compensation. However, because no award had been made to either Wilken or Ramsey, there was nothing for the Company to "hold". Thus *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* ____, U.S. ____, 80 L.Ed.2d 428 (1984) is inapposite because the claim for interest in that case was based upon sums of money illigally held for a period of time. *Id.* at 438. Nothing was held in this case.

Petitioners further contend that this Court should hold their petition for decision pending disposition of the grant of certiorari in *Massachusetts Mutual Life Insurance Co. v. Russell,* No. 84-9, ____ U.S. ____, 83 L.Ed.2d 29 (1984). There is no basis for granting petitioners' request.

In *Russell* plaintiff sued to recover damages on a number of theories. *Russell v. Massachusetts Mutual Life Insurance Co.,* 722 F.2d 482, 484 (9th Cir. 1983), *cert. granted,* 83 L.Ed.2d 29 (1984). In this case, petitioners sued for equitable relief, primarily for injunctions and impressment of trusts. *See Hechenberger v. Western Electric Co., Inc.,* 570 F.Supp. 820, 822 (E.D. Mo. 1983). Their claim for "extra-contractual" damages was raised as an afterthought to avoid mootness. Unlike *Russell,* no live controversy exists with respect to these belated damage claims, for they cannot now be asserted to resurrect a moot case. *See Socialist Workers Parter v. Gilligan, supra.* Accordingly, the Eighth Circuit's decision does not con-

flict with that of the Ninth Circuit,[27] nor does this contention otherwise present an issue worthy of this Court's review.

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[27] Petitioners did seek attorneys' fees and costs pursuant to ERISA 29 U.S.C. §1132(g), and punitive damages. *Hechenberger v. Western Electric Co., Inc.*, 570 F.Supp. 820, 822 (E.D. Mo. 1983). The Court of Appeals held that the request for fees and costs did not save petitioners' case from mootness. App. A, p. A-5. Petitioners do not challenge that holding in their petition, and it does not present an issue worthy of review. The District Court struck petitioners' punitive damage claim because, among other reasons, it was not supported by a sufficient allegation: petitioners merely alleged "deliberate" conduct. *Hechenberger v. Western Electric Co., Inc., supra.* The District Court's holding on this ground and the affirmance by the Court of Appeals presents no issue conflicting with the Ninth Circuit's decision in *Russell.* The Ninth Circuit expressly held that 29 U.S.C. §1109 authorizes an award of punitive damages only when a plan fiduciary "acted with actual malice or wanton indifference to the rights of a participant or beneficiary." *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 492 (9th Cir. 1983). Such conduct was neither alleged by petitioners nor is it evidenced by the record. Moreover, petitioners did not invoke the provisions of §1109 as a basis for their action. Pet./Cert. at 2. There is nothing presented by this claim warranting review in this Court.

CONCLUSION

The decision of the Court of Appeals is correct and fully comports with the decisions of this Court, and is not in conflict with the decisions of any other Circuit Court of Appeals. The Petition for a Writ of Certiorari presents no issue worthy of this Court's consideration, and it should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

1980 Agreements, Communication Workers of America and Southwestern Bell, Article VII.

ARTICLE VII
PENSIONS, DISABILITY BENEFITS, AND DEATH BENEFITS

During the term of this Agreement, no change may be made without the consent of the Union in the existing "Plan for Employees' Pensions, Disability Benefits, and Death Benefits" which would reduce or diminish the benefits or privileges provided thereunder. Any claim that such benefits or privileges have been so diminished or reduced may be presented as a grievance and if not resolved by the parties under their grievance machinery may be submitted to arbitration pursuant to the provisions of Article IV hereof but in any such case any decision or action of the Company shall be controlling unless shown to have been discriminatory or in bad faith and only the question of bad faith or discrimination shall be subject to the grievance procedure or arbitration.

APPENDIX B

Southwestern Bell Telephone's Exhibit 1 (Sickness and Accident Disability Benefit Plan, §3, ¶3), attached to answers to plaintiff's interrogatories.

SECTION 3. ADMINISTRATION

3. a. If the authority to grant or deny claims is retained by the Employees' Benefit Committee and not delegated to an Area Benefit Committee, the Company shall appoint an Employees' Benefit Claim Review Committee, consisting of one or more persons who are not members of the Employees' Benefit Committee.

b. Any participant whose claim for benefits has been denied may, within 60 days after receipt of notice of denial, submit a written request for review of the decision denying the claim. In such case, the Review Committee, or the Employees' Benefit Committee, if denial was by an Area Benefit Committee, shall

(i) make a full and fair review of such decision within 60 days after receipt of the written request for review, or within an additional 60 days, provided the claimant is notified of the delay and the reasons for requiring such additional time; and

(ii) notify the claimant in writing of the review decision, specifying the reasons for such decision.

c. Any participant whose claim for benefits has been denied shall have such further rights of review as are provided in Section 503 of ERISA and regulations promulgated thereunder, and the Review Committee and Employees' Benefit Committee or Area Benefit Committee shall retain such right, authority and discretion as is provided in or not expressly limited by said Section 503 of ERISA and the regulations thereunder.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS, CLERK

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER, WILLIAM V. WILKEN, and CHARLES W. RAMSEY,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC., now known as AT&T TECHNOLOGIES, INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now known in part as AT&T TECHNOLOGIES SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS WESTERN ELECTRIC CO., INC. (NOW KNOWN AS AT&T TECHNOLOGIES, INC.) AND ITS SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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21

QUESTION RESTATED

Whether this case was properly dismissed on grounds of mootness where the challenged practice of reducing certain workers' compensation payments by the amount of benefits previously paid under disability plans has not been and never will be applied to petitioners because the respondent employers abandoned the practice of asserting such offsets and the applicable state law has been amended to prohibit these offsets.

TABLE OF CONTENTS

	Page
Question Restated	i
Table of Authorities	iii
Statement of the Case	2
Reasons for Denying Certiorari	4
Conclusion	6

TABLE OF AUTHORITIES

Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) 5

Anderson v. Alpha Portland Industries, Inc., 727 F.2d 177 (8th Cir. 1984) 5

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 4

Franks v. Bowman Transportation Co., 424 U.S. 747, 754-56 (1976) 4

Hall v. Beals, 396 U.S. 45 (1969) 4

Imler v. Southwestern Bell Telephone Co., 650 P.2d 712 (Kan. App. 1982) 5

Kross v. Western Electric Co., Inc., 701 F.2d 1238 (7th Cir. 1983) 5

Massachusetts Mutual Life Insurance Co. v. Russell, *certiorari granted,* No. 84-9, 53 U.S.L.W. 3235 (Oct. 2, 1984) 5

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 5

Preiser v. Newkirk, 422 U.S. 395, 402 (1975) 4

Schneider Moving & Storage Co. v. Robbins, 52 U.S.L.W. 4476 (U.S. Apr. 18, 1984) 5

Vitek v. Jones, 445 U.S. 480, 487 (1980) 4

Weinstein v. Bradford, 423 U.S. 147 (1975) 4

Other Authorities

29 U.S.C. §1001, *et seq.* 2

Rule 28.1, Rules of the Supreme Court of the United States 2

No. 84-933

IN THE

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RICHARD A. HECHENBERGER, WILLIAM V. WILKEN, and CHARLES W. RAMSEY,
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WESTERN ELECTRIC CO., INC., now known as AT&T TECHNOLOGIES, INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now known in part as AT&T TECHNOLOGIES SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS WESTERN ELECTRIC CO., INC. (NOW KNOWN AS AT&T TECHNOLOGIES, INC.) AND ITS SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners are three individual employees, one of whom, Richard A. Hechenberger,[1] was an employee of respondent Western Electric.[2] They seek review of a decision of the Eighth Circuit that dismissed a challenge to an administrative practice of the Missouri Division of Workers' Compensation on grounds of mootness. Under the challenged practice, a Missouri employer had been permitted to reduce the amount of certain payments made to an employee under the Missouri state workers' compensation law by amounts that had been previously paid to the employee under the employer's disability plan. Petitioners claimed that the state law permitting these offsets was preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 *et. seq.* ("ERISA") and that the fiduciaries of the Western Electric and Southwestern Bell disability plans at issue would have violated their duties to petitioners if they had asserted these "offset" claims against them.

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[1] Although the claims of all three petitioners are frivolous, respondent Western Electric's interest is, of course, confined to petitioner Hechenberger's claims.

[2] Statement Required by Rule 28.1: Respondent Western Electric Company, which changed its name to AT&T Technologies, Inc. on January 1, 1984, is a wholly-owned subsidiary of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to its other wholly-owned subsidiaries, AT&T has ownership interests either directly or through wholly-owned subsidiaries in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti & C., S.P.A.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; and Share Tech, Inc.

The basis for the Eighth Circuit's holding that the petitioners' substantive claims are moot is that the challenged practice has never been and never will be applied to any of the petitioners.[3] Each petitioner was paid the full amount of his benefits under the respective disability plan, and Western Electric announced that it had abandoned its practice of seeking offsets while petitioner Hechenberger's workers' compensation claim was still pending before the Missouri Division of Workers' Compensation. Most fundamentally, the Missouri legislature has amended its workers' compensation statute to prohibit the offsetting of disability benefits against workers' compensation benefits, so there is no possibility that the practice could be applied to Hechenberger (whose workers' compensation claim is still pending) or any other employee in the future in Missouri.

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[3] The District Court dismissed the individual claims as moot before it ruled on the motions for class certification. (Supplemental appendix to Petition, p. SA-4—SA-5)

REASONS FOR DENYING CERTIORARI

The Eighth Circuit's decision neither possesses national importance nor is otherwise review-worthy. Rather, it is simply a correct application of well-established principles of Federal jurisdiction. Few propositions are better settled than that a Federal court may not adjudicate the legality of a practice where, as here, the challenged conduct has ceased, there is no "reasonable expectation" that the challenged practice will recur, and the challenged conduct had no direct or other consequences for the individual plaintiffs. *Preiser v. Newkirk,* 422 U.S. 395, 402 (1975); *Accord, Vitek v. Jones,* 445 U.S. 480, 487 (1980). Indeed, the Court has repeatedly held that where, as here, a challenged provision of a state statute has been amended so as to afford the relief requested by the individual plaintiffs, the claim is moot and must be dismissed. See *e.g., Hall v. Beals,* 396 U.S. 45 (1969); *Diffenderfer v. Central Baptist Church,* 404 U.S. 412 (1972).[4]

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[4] The fact that petitioners purported to bring a class action has no pertinence to the application of the mootness doctrine here. As the Eighth Circuit observed below, nothing prevented an employee actually subjected to an offset, prior to the amendment of the state statute, from suing on the basis of such practice. The Court further noted:

> Precisely such an action is currently pending in the United States District Court for the Eastern District of Missouri, and is docketed as *Clemens v. Southwestern Bell Telephone Co.,* No. 84-0756C(3). Class certification has been requested in that case. (Appendix A to Petition, p. A-5)

A second action involving the challenged practice is also pending in the United States District Court for the Eastern District of Missouri. *Wilken v. AT&T Technologies, Inc.,* No. 83-2198C(3).

Moreover, because the offset issue is not one that is "capable of repetition, yet evading review" and because no decision was made on class certification before the individual plaintiffs' claims were mooted, there could be no basis for adjudicating plaintiffs' claims in any event. See *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 754-56 (1976); *Weinstein v. Bradford,* 423 U.S. 147 (1975).

Three additional questions that petitioners attempt to raise are each also foreclosed by the Eighth Circuit's holding on mootness.

Petitioners first argue that the courts below should have addressed whether the plans' fiduciaries were guilty of dual loyalty and adversarial conduct. The short answer to this claim is that the fiduciaries engaged in *no* conduct that injured petitioners. Each petitioner was timely paid all benefits due under the plans and the respondent employers did not and could not offset those payments in the workers' compensation proceedings administered by the Missouri Division of Workers' Compensation.[5]

Petitioners next argue that the Court of Appeals erred in not deciding whether ERISA provides a remedy to so called "discouragees"—employees allegedly discouraged by fiduciary misconduct from seeking plan benefits. Yet none of the peti-

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[5] Further, despite the fact that Western Electric's employee, Hechenberger, claims that he has been denied benefits under the plan, he never filed a claim with the Employees' Benefit Committee (which administers the plan), nor was any denial of an asserted claim ever presented to that committee for review. It is fundamental that an individual who seeks benefits under ERISA must first exhaust his plan remedies, in order to afford the plan fiduciaries an opportunity to review the claim and so obviate judicial action. *Anderson v. Alpha Portland Industries, Inc.*, 727 F.2d 177 (8th Cir. 1984); *Kross v. Western Electric Co., Inc.* 701 F.2d 1238 (7th Cir. 1983). See *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Imler v. Southwestern Bell Telephone Co.*, 650 P.2d 712 (Kan. App. 1982).

Hechenberger's inability to show that he has been harmed by any act or decision of Respondents makes *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) and *Schneider Moving & Storage Co. v. Robbins*, 52 U.S.L.W. 4476 (U.S. Apr. 18, 1984), wholly inapposite. Quite simply, Hechenberger's claims, which were never ripe for presentation, were rendered moot in the subsequent course of events. Similarly, *Massachusetts Mutual Life Insurance Co. v. Russell, certiorari granted* No. 84-9, 53 U.S.L.W. 3235 (Oct. 2, 1984) is inapposite. Whatever this Court decides in *Massachusetts Mutual*, the decisive point is that that case was not moot and this case is.

tioners was a discouragee because all petitioners sought *and received* all payments due them under the plans. This is especially so in the case of Western Electric's employee, Hechenberger, for he sought benefits under both the plan and workers' compensation; indeed his workers' compensation claim is currently pending.

Finally, petitioners assert that the courts below should have decided whether ERISA allows additional so-called "extracontractual" damages for violations of respondents' benefit plans and for the offset practice. Because petitioners suffered no injury either under the plans (from which they received full payments) or from the offset practice (which was not applied to them), there is no basis for any claim of extracontractual damages. It too is moot.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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